

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MINNESOTA TIMBERWOLVES
BASKETBALL, LP, *RESPONDENT*

and

Case 18-RC-169231

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES,
ITS TERRITORIES AND CANADA,
AFL-CIO, *PETITIONER*

RESPONDENT'S RESPONSE TO NLRB ORDER GRANTING
PETITIONER'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND ORDER

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I. INTRODUCTION

Focusing almost exclusively on the “independent business” and “control” factors, the above-captioned union (“the Petitioner”) argues that the Regional Director got the law and facts wrong when he determined that the individuals the Union sought to represent are independent contractors, and not employees. But in making this argument, the *Petitioner* misstates the record evidence, and improperly attempts to dismiss other, relevant factors as “irrelevant” or somehow deserving of “little weight.” However, the eleven factors are *all* relevant here and, in sum, support the Regional Director’s conclusion. The Regional Director correctly examined both the factors that support and those that detract from independent-contractor status. The Board should not disturb the Regional Director’s Decision and Order (“D&O”).

II. PROCEDURAL HISTORY

On February 8, 2016, the Petitioner filed a petition (“the Petition”) seeking an election to represent a group of individuals (“the Proposed Unit”) for the purposes of collective bargaining. At the Hearing,¹ the parties stipulated to amend the Petition’s Proposed Unit description as follows:

Included:

All regular part-time freelance technicians, including Directors, Technical Directors, Audio/Tape Operators, Engineers in Charge, Engineers, Camera Operators (including stationary, mobile, and remotely operated), Font Operators, Thunder Operators, Replay Operators, Utilities and others in similar technical positions performing pre-production, production and post-production work in connection with closed circuit telecasts displayed on the in-house video system within the Employer's home arena, including such telecasts of Minnesota Timberwolves games, Minnesota Lynx games, pre-game shows and post-game shows.

¹ “The Hearing” refers to the proceedings held before Region 18’s Hearing Officer on February 18, 2016.

Excluded:

All other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(Petitioner Ex. 1).²

Minnesota Timberwolves Basketball, LP (“Respondent” or “Minnesota Timberwolves”) argued that the Proposed Unit is composed of independent contractors (not employees). After a Hearing on February 18, the Regional Director agreed with the Respondent and dismissed the Petition on March 3. The Petitioner then Requested Review on March 17 and the Respondent filed an opposition on March 24. On July 19, the Board granted the Petitioner’s Request for Review of the Regional Director’s D&O, finding that “it raises substantial issues warranting review.” This Response follows.

III. FACTS

At each Minnesota Timberwolves home basketball game, sixteen (16) independent contractors work in various in-house control room positions, related to the media content displayed during the game on the large center video board (“the center-hung board”) and other monitors throughout the arena. (Tr. 14-15).³ These positions are: (1) Director; (2) Tech Director/Board Op; (3) Audio/Tape Op; (4) Thunder Operator; (5) Replay 1; (6) Replay 2; (7) Replay 3 (Replay Assistant); (8) Engineer in Charge; (9) Engineer 2 (Assistant to Engineer in Charge); (10) Font; (11)-(12) Camera (one at each basket); (13) Camera (fan camera); and (14)-(16) Utility. (Petitioner Ex. 2). These individuals report at different times in advance of game time, depending on their positions. (See Respondent Ex. 3; Petitioner Ex. 5). The individuals in the Proposed Unit wear what they want for the games from their own personal wardrobes. (Tr.

² “Ex.” refers to Exhibits received into evidence at the Hearing.

³ “Tr.” refers to the Hearing transcript.

73-74). There is no requirement that they wear any sort of “uniform” or any other paraphernalia of the Respondent.⁴ (Tr. 74).

The Director – typically, Kari Alstrand, who does business as “Coffee Girl Productions” (Respondent Ex. 6 at 2) – makes the final decisions as to what is being shown on the center-hung board, and is generally the crew person in charge of the final product. (Tr. 30). The Director works closely with Respondent’s Director of Live Programming and Entertainment to make sure the production is up to Respondent’s and the NBA/WNBA’s standards. (Tr. 30). Alstrand has decades of experience in directing that she brings to this independent-contractor position. (Tr. 37).

The Technical Director is the right hand of the Director. (Tr. 32). As the Director calls out “camera 3,” for example, the Technical Director is the person who literally pushes the button to execute the Director’s instructions. (Tr. 32). The Respondent does not train Technical Directors regarding the technical expertise necessary to execute a live sporting event. (Tr. 36).

The Font position involves displaying certain basketball statistics on the center-hung board. (Tr. 33). The individual in this position must have a deep knowledge of basketball to decide what is important in context of a particular play, etc. (Tr. 33). Jimmy Lovestrand is generally the independent contractor working Font because of his basketball knowledge. (Tr. 33-34).

There are three camera positions for each game: two on the baselines on the floor and one roving “fan cam.” (Tr. 34). The camera operators are expected to have a certain level of

⁴ Although the camera and the utility positions were provided a t-shirt, it is their choice whether or not to wear it to games, and there are absolutely no consequences for deciding not to do so. (Tr. 74, 156, 194). Petitioner attempted to rely upon an e-mail directing certain individuals to wear “show blacks.” (Petitioner Ex. 4). However, this instruction was related to a charity gala, not a game. (Tr. 105).

proficiency with working a camera and shooting live sporting events. (Tr. 35). Respondent would not train someone “off the street” to operate a camera. (Tr. 35). These cameras are owned by the City of Minneapolis and are hard-wired into the control room. (Tr. 35).

The Audio position handles the technical work related to sound, including setting levels from the control room and operating tapes. (Tr. 38). Respondent generally expects that audio people are knowledgeable in the field. (Tr. 38).

The Replay position is responsible for creating in-process live replays. (Tr. 39). For example, a great dunk might be replayed immediately; the Replay individual might also put together a more extensive package of highlights from the first half. (Tr. 38-39). The Replay role requires a fair amount of technical experience, as it is necessarily very fast-moving. (Tr. 39). When games are not on televised broadcast, this would be the replay that officials would review to make decisions on calls during the game. (Tr. 39).

The Utility position essentially wraps cable for the camera operators while the cameras are moving and wraps up the cable at the end of the games, using a special technique. (Tr. 40). The Utility position also operates the “DJ Cam” (camera) in the DJ booth. (Tr. 40).

Respondent hires two engineers each game – the Engineer In Charge and “Engineer Two.” (Tr. 28). Their role is to make sure the technical functions are working properly. (Tr. 28). These are highly skilled positions. (Tr. 29). Sean Nottingham is generally hired as the Engineer in Charge. (Tr. 29, 121). Nottingham does business as Nottingham LLC. (Respondent Ex. 4). Nottingham provides his own tools and equipment for the engineer work; Respondent does not reimburse Nottingham for this equipment. (Tr. 29-30).

None of these classifications are treated by Respondent as “employees.” (Tr. 31).

In terms of the individuals' actual work for the Timberwolves, with the exception of the Director position who meets with Respondent's production staff (Chadwick Folkestad, Director of Live Programming and Entertainment) on game days to go over the "rundown," the other individuals do not meaningfully interact with Timberwolves employees. (Tr. 71-72, 76-77). During the game, the Director (who is also an independent contractor) ultimately decides the content going to the board at any given time and, as the name suggests, "directs" the other 15 individuals. (Tr. 76-77). Each person in the crew wears a headset and listens for the Director's instructions. (Tr. 76). The individuals in the Proposed Unit are not required to maintain "records" of their work (except for submitting invoices for payment). (Tr. 66, 126, 216; Respondent Exs. 3, 6). The Engineer is in charge of all technical aspects of the production. (Tr. 42).

The individuals in the Proposed Unit access Respondent's premises at Target Center in the same way that other vendors do. (Tr. 74-75, 226). The individuals in the Proposed Unit are not given the key cards or ID cards that employees receive and their access to the facility is limited to what is necessary for the specific tasks they perform. (Tr. 74-75, 133-34). Below the Court level in the Target Center is a control room with three rows of seating and television monitors of the various camera feeds. (Tr. 31). Many of the individuals in the Proposed Unit report directly to this control-room space and work exclusively in the control room. (Tr. 31). These individuals, therefore, only have contact with the other individuals in the room (there are not any employees/managers/supervisors of Respondent in the control room). (Tr. 31-32).

As way of background, the individuals at issue in this Petition were never "hired" by the Minnesota Timberwolves. Rather, they at some point were added to a roster (a vendor list) as

qualified⁵ to perform certain technical roles related to in-house game day entertainment. (Respondent Ex. 1; Tr. 26, 42-43). Many of these individuals were added through connections they made via other, similar work in the community. (Tr. 43, 149). They can agree to perform contractor work for the Respondent on a game-by-game basis. (Tr. 48-49, 152, 178-79). The individuals in the Proposed Unit are free to reject work from the Respondent without any consequences, and effectively set their own schedules. (Tr. 50, 177). There is no minimum or maximum number of games. (Tr. 49, 178, 189). The individuals in the Proposed Unit are free to arrange their own subs if they are unable to make a game. (Tr. 49, 153, 188-89). Respondent does not need to “approve” these substitutions, although it does ask to be advised of them. (Tr. 49, 190; Respondent Ex. 3).

Erik Nelson, Broadcast Production Manager, interacts with these individuals insofar as he e-mails them the home game schedule to inquire about availability, tracks the schedule, and receives invoices from the individuals for payment. (Tr. 48-49, 51-52; Respondent Ex. 3; Petitioner Ex. 2). The individuals in the Proposed Unit are generally paid a flat rate per game, which fluctuates based on the position. (Tr. 54, 56). Individuals in the Proposed Unit can attempt to negotiate a higher rate. (Tr. 56). The individuals in the Proposed Unit are not given any overtime. (Tr. 159, 184-85, 207). The individuals in the Proposed Unit complete a W-9 tax form and are given a 1099 for their own individual tax purposes; the Minnesota Timberwolves does not give them a W-2 or make any taxable withholdings on their behalf. (Respondent Exs. 4, 5). The individuals are required to submit invoices for their services in order to be paid. (Respondent Ex. 6). The individuals in the Proposed Unit, like any other vendor of the Respondent, are required to accept payment for services via electronic ACH (Automated

⁵ The Respondent expects these individuals to already possess the necessary technical background.

Clearing House) payments. (Respondent Ex. 2). The individuals in the Proposed Unit are not on Respondent's "payroll." (Tr. 131).

There are additional significant differences between how the Minnesota Timberwolves treats the individuals in the Proposed Unit compared with how it treats its employees. To be considered for employment with Respondent, an individual applicant generally completes an application and interview process. (Tr. 129). Hire is contingent on passing a background check, drug testing, and reference check. (Tr. 129). Upon hire, employees complete a formal orientation process and are given an employee handbook. (Tr. 129, 136). Among other benefits, employees are eligible for certain fringe benefits such as medical insurance, dental insurance, life insurance, 401(k), paid time off, season tickets, etc. (Tr. 132). The individuals in the Proposed Unit do none of these things and are not eligible for any benefits. (Tr. 132). Unlike employees, the individuals in the Proposed Unit are not covered under the Respondent's workers' compensation and unemployment compensation insurance. (Tr. 135). Indeed, the Timberwolves' Human Resources is completely uninvolved with the individuals in the Proposed Unit, and none of the Respondent's employment policies/handbook applies to these individuals. (Tr. 135-36).

As reflected in the amounts stated in the 1099 forms, the individuals in the Proposed Unit do not depend on this work for their regular income.⁶ (Respondent Ex. 5 (stating individual received \$4,646.79 in 2015)). Many, if not all, of the individuals in the Proposed Unit perform similar work in the metro area (*i.e.* for the Minnesota Twins, Vikings, Gophers etc.) and hold themselves out as freelancers. (Tr. 142, 172-73, 234; Respondent Ex. 7). The Respondent does

⁶ Petitioner's witness, Jason Wiltse, claimed on direct examination that the Timberwolves' projects comprised approximately 20% of his income. (Tr. 174). On cross examination, when confronted with data from his 1099 (a modest figure), he admitted that he had misleadingly inflated that percentage. (Tr. 193).

not place any limitation as to their ability to work for other organizations. Indeed, none of these individuals rely upon Respondent as their sole source of income. (Tr. 124, 125, 140, 196). One of the two individuals in the Proposed Unit who testified on behalf of the Petitioner, Jason Wiltse, operates his own production company wherein he, himself, uses independent contractors much like the Minnesota Timberwolves does to execute his own “vision.” (Tr. 180-82).

IV. ARGUMENT

A. Legal Framework

Section 2(3) of the Act provides: “The term ‘employee’ shall include any employee ... but shall not include ... any individual having the status of an independent contractor....”

Recently in FedEx Home Delivery, 361 NLRB No. 55 (Sept. 30, 2014), the Board “restate[d] and refine[d] the Board’s approach” to determining whether an individual is an employee or independent contractor. See also FedEx Home Delivery, 362 NLRB No. 29 (Mar. 16, 2015) (denying Respondent’s Motion for Reconsideration).⁷ In doing so, however, the Board first “reaffirm[ed] the longstanding position—based on the Supreme Court’s United Insurance decision [(NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968))]—that, in evaluating independent-contractor status in light of the pertinent common-law agency principles, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” 361 NLRB No. 55, slip op. at 1 (footnotes and quotations omitted); see also slip op. at 2 (quoting United Insurance: “[T]here is no shorthand formula or magic phrase that can be applied to find the answer”; rather, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” 390 U.S. at 258.); see also

⁷ The FedEx case is pending on Respondent FedEx’s Petition for Review in the D.C. Circuit. See Case Nos. 14-1196, 15-1055, and 15-1166.

Restatement (Second) of Agency, Section 220 (1958) (listing ten independent-contractor factors); Austin Tupler Trucking, 261 NLRB 183, 184 (1982) (noting in this context that “[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other”).

With this context, the “refined” FedEx formulation is as follows:

- (1) Extent of Control by Employer (“Control Factor”);
- (2) Whether or Not the Individual is Engaged in a Distinct Occupation or Business (“Distinct Operation Factor”);
- (3) Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision (“Direction Factor”);
- (4) Skill Required in the Occupation (“Skills Factor”);
- (5) Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work (“Tools Factor”);
- (6) Length of Time for which Individual is Employed (“Tenure Factor”);
- (7) Method of Payment (“Payment Factor”);
- (8) Whether or not Work is Part of the Regular Business of the Employer (“Employer’s Business Factor”);
- (9) Whether or not the Parties Believe they are Creating an Independent-Contractor Relationship (“Belief Factor”);

- (10) Whether the Principal is or is not in the Business (“Principal’s Business Factor”);
and
- (11) Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business (“Independent-Business Factor”).

Slip op. at 12-16. Weighing the relationship as a whole, the factors support the Regional Director’s conclusion that the individuals in the Proposed Unit are **not** employees. See Crew One Productions, Inc. v. NLRB, 2016 U.S. App. LEXIS 1765 (11th Cir. Feb. 3, 2016) (granting petition for review regarding underlying NLRB decision involving this Petitioner; Circuit concluding that individuals at issue were independent contractors and that the Board’s decision “was contrary to law”).

B. The Regional Director’s Decision and Order (“D&O”).

The Regional Director properly applied the FedEx formula to determine that the Proposed Unit was composed of independent contractors. The Regional Director based his conclusion on the following careful analysis that determined six of the eleven factors supported that finding, three were inconclusive, and *only two* weighed in favor of determining these individuals are statutory employees.

First, the Regional Director determined that the Control Factor weighed in favor of independent contractor status, because, inter alia, “[i]n this case the Employer exerts very little control over the essential details of the crew members’ work” and “[t]here is no evidence that the Employer disciplines crew members.” (D&O at 5-7).

Second, the Regional Director found that the Distinct Operation Factor supported finding independent-contractor status because the individuals in the Proposed Unit “do not conduct business in the Employer’s name or hold themselves out as employees of the Employer,” they

“are not well integrated into the Employer’s organization,” and they “clearly possess the infrastructure and support to operate as separate entities.” (D&O at 7).

Third, the Regional Director concluded that the Direction Factor supported concluding these individuals are independent contractors because “the record reflects that the crew members are generally not subject to supervision by the Employer,” “[t]he Employer’s supervisors and managers do not evaluate crew members’ performance,” “[t]here is no evidence that the crew members are required to submit any records of their work to the Employer,” “the Employer does not discipline the crew members and they are not issued the Employer’s handbook of personnel policies and procedures,” and “[t]here is no evidence that the crew members are regulated by any rules or guidelines.” (D&O at 8-9).

Fourth, the Regional Director concluded that the Skills Factor “weighs heavily in favor of independent contractor status” because “the crew members in the instant case perform skilled work, as evidenced by the fact that not all crew members are capable of working in all the various production positions. The Employer expects the crew to possess skill and experience in the production of live sports programming or sports broadcasting” and “[t]he Employer typically does not train crew members and if a new individual joins the crew, they receive guidance from other established crew members” (not the Minnesota Timberwolves). (D&O at 9-10).

Fifth, the Regional Director determined the Employer’s Business Factor supported finding that these individuals are independent contractors because “the crew members do not perform functions that are at the core of, or an integral and indispensable part of, the Employer’s regular business.... It is undisputed that if the center-hung board was not operational, the basketball game would continue to be played; conversely, if the basketball game were not played, there would be nothing to display on the center-hung board.” (D&O at 12-13).

Sixth, the Regional Director concluded that the Principal's Business Factor suggested that these individuals are independent contractors because, quite simply, "[t]he Employer is clearly not a video production company." (D&O at 13-14).

The Regional Director found three factors "inconclusive" as to the independent-contractor question: the Payment Factor (D&O at 10-12), the Belief Factor (D&O at 13), and the Independent-Business Factor (D&O at 14-15). Finally, the Regional Director concluded that the remaining factors – the Tools Factor and Tenure Factor – supported finding employee status. (D&O at 10).

In sum, the Regional Director reasoned:

Weighing all of the particulars of the crew members' relationship with the Employer, I conclude that the Employer has met its burden to establish that the crew members are independent contractors. The crew members exercise significant control over the details of their work. They are engaged in an occupation that is distinct from the Employer. The crew members are highly skilled. They perform their work without substantial supervision by the Employer. Their work is not part of the Employer's regular business.

There are only two common-law factors that weigh in favor of employee status: the supply of tools and equipment and length of the crew members' employment. The three common-law factors that are inconclusive (whether the parties believe they were creating an independent contractor relationship, the method of payment, and whether the crew members are rendering services as independent businesses) do not support a finding that the individuals sought by Petitioner are either employees or independent contractors because some of the considerations of the Board in judging these factors support employee status, and others do not. Thus, the two factors in favor of employee status do not outweigh the many factors supporting my finding that the crew members are independent contractors.

Accordingly, as it appears the entire petitioned-for unit is composed of independent contractors, I shall dismiss the petition.

(D&O at 15).

C. There Is No Basis to Disturb the D&O.

Focusing the vast majority of its argument on just two of FedEx's eleven factors: (1) the Independent-Business Factor (Pet. Brief at 9-13)⁸ and (2) Control Factor (at 13-19), the Petitioner advances only a lukewarm protest to the Regional Director's analysis of (3) the Direction Factor (at 19-20), (4) the Distinct Operation Factor (at 20-22), (5) the Skills Factor (at 22), (6) the Employer's Regular Business Factor (at 22-24), and (7) the Principal's Business Factor (at 24). The Petitioner does not address the remaining factors. The Petitioner's arguments lack merit; the D&O should not be disturbed as it was correctly decided.

1. FedEx Did Revise the Applicable Framework.

As an initial matter, the Petitioner suggests that FedEx "only reaffirmed an existing test," (Pet. Brief at 17), but the Petitioner is citing to the wrong portion of FedEx in making this argument.⁹ (Pet. Brief at 8). The Petitioner's Brief first lists out the ten common-law factors (from Restatement § 220), which are outlined at page two of the FedEx decision (Pet. Brief at 7-8), but mostly ignores the framework the Board ultimately adopted at pages 12-16, which "tracks" these factors "before concluding with the **newly-articulated** independent business factor." Slip op. at 12 (emphasis added) (see also Pet. Brief at 9 (acknowledging in passing that FedEx added the Independent-Business Factor to the independent-contractor inquiry)). The Regional Director is absolutely correct that there are few post-FedEx decisions which evaluate all eleven factors. See Sisters' Camelot, 363 NLRB No. 13, slip op. at 2 (Sept. 25, 2015) ("We analyze this case under FedEx ... in which the Board restated **and refined** the analysis for

⁸ "Pet. Brief" refers to the Brief that Petitioner filed on March 17 in support of its Request for Review.

⁹ Ironically, the Petitioner argues that "review should be granted because Decision [sic] departs from and is contrary to the Board's recent reported precedent in FedEx" (Pet. Brief at 2).

evaluating whether individuals are employees or independent contractors.” (Emphasis added)); see also D&O at 14-15 (Regional Director analyzing the newly-articulated eleventh factor).

Further, to the extent the Regional Director *focused on* post-FedEx cases, this is not a basis to disturb the D&O. It is appropriate to rely upon the most recent authority from the Board. Further, it is completely inaccurate to suggest the Regional Director failed to consider pre-FedEx cases or suggested they had been overruled or were unworthy of consideration. Indeed, the Regional Director cited to Lancaster Symphony Orchestra, 357 NLRB No. 152 (2011), which the Petitioner relies upon heavily in its Request for Review. (D&O at 7). The Regional Director discusses Pennsylvania Academy of the Fine Arts, 343 NLRB 846 (2004), at length. (D&O at 11-12). The Regional Director also generally relies upon the Restatement (Second) of Agency § 220. (D&O at 4-5, 10). The Petitioner’s claim that “[t]he Regional Director mistakenly believes that the Decision should have **only** been governed by cases issued in the wake of FedEx” is an overstatement. (Pet. Brief at 17 (emphasis added)).

2. Independent-Business Factor

First, the Petitioner argues at length that the Regional Director should have determined that the newly articulated Independent-Business Factor supported finding employee status, rather than being “inconclusive.” (Pet. Brief at 9-13; D&O at 14-15). In so arguing, the Petitioner overstates the Independent-Business Factor’s importance, and conflates it with entrepreneurial opportunity. (Pet. Brief at 9-13). However, the Board in FedEx made “clear” that entrepreneurial opportunity represents just “**one aspect** of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*.” 361 NLRB No. 55, slip op. at 11 (bold emphasis added). Because the new Independent-Business Factor “encompasses considerations that the Board has examined in previous cases,” another aspect includes “whether the putative contractor has a realistic ability to

work for other companies.” Id. at 12 (declining “to treat entrepreneurial opportunity as the decisive factor in its inquiry”).

By focusing exclusively on *pre-FedEx* decisions to support its argument regarding this *new* factor, the Petitioner’s arguments miss the mark. The Board has recently explained that “the Board gives weight to actual, not merely theoretical, entrepreneurial opportunity” by assessing “the specific work experience of those individuals ... including whether a substantial percentage of them have pursued other entrepreneurial opportunities,” and also “evaluate[s] the constraints imposed by a company on the individual’s ability to pursue this opportunity.” Sisters’ Camelot, 363 NLRB No. 13, slip op. at 5 (quotations to FedEx omitted). The evidence demonstrated that these individuals are rendering services as an independent business. They can and do work for other companies. (Respondent Ex. 7; Tr. 124, 140, 196). The individuals at issue in the Proposed Unit do pursue other freelance media opportunities, the Timberwolves place no limitations on their efforts in this regard, and their work for Respondent is not their primary income. (See Respondent Ex. 7).

The Petitioner relies upon two *pre-FedEx* Board decisions and one Circuit Court opinion to support its argument: Lancaster Symphony Orchestra, 357 NLRB 1761 (2011), *enf.* 2016 U.S. App. LEXIS 7007 (D.C. Cir. 2016); BKN, Inc., 333 NLRB 143 (2001); Corporate Express Delivery Systems v. NLRB, 292 F.3d 777 (D.C. Cir. 2002).

Lancaster did not construe the independent-business factor as it stands today because the factor was not adopted until FedEx, three years later. Instead, Lancaster assessed only whether orchestra musicians “enjoy entrepreneurial opportunity or suffer risk.” 357 NLRB at 1764. Lancaster is distinguishable from the instant facts because the musicians could not assign their seats to another, and there were no negotiations over their fees with the symphony. Here, the

individuals in the Proposed Unit can select substitutes on any given game night, and they have the ability to negotiate fees.

In BKN, Inc., the Board concluded the writers have “no significant entrepreneurial opportunity for gain or loss when they are writing scripts,” but the writers must “work[] exclusively for the Employer” and had no ability to negotiate their compensation. 333 NLRB at 145 (further finding “[a]lthough the freelance artists and designers apparently are free to work for other employers while employed by the Employer, they are required to sign confidentiality agreements” and have no ability “to increase the compensation received from the employer”). Corporate Express is also not relevant to this factor, as the D.C. Circuit “focus[ed] not upon the employer’s control of the means and manner of the work but instead upon whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss,” finding this single factor “captures the distinction between an employee and an independent contractor.” 292 F.3d at 780. Post-FedEx, the Board would not endorse this “shift of emphasis to entrepreneurialism” as the dispositive inquiry. Id.

In addition to relying upon outdated case law in making its argument, the Petitioner misstates the record. The Petitioner’s claim that the individuals in the Proposed Unit “have no way of increasing their Timberwolves earnings” (Pet. Brief at 10), ignores that they can and have negotiated higher game-day rates. (Tr. 56). The Petitioner’s assertion that these individuals do not “make capital investments” (Pet. Brief at 10) is also wrong. The Engineer In Charge, Nottingham, provides his own tools and equipment for the engineer work; Respondent does not reimburse Nottingham for this equipment. (Tr. 29-30). The Regional Director properly evaluated this new factor.

3. Control Factor

Second, the Petitioner argues that the Control Factor supports a finding of employee status. (Pet. Brief at 13-19). However, the Regional Director correctly evaluated the evidence, which supported his conclusion that the Respondent does *not* have “fundamental control over their job performance.” FedEx, 361 NLRB No. 55, slip op. at 13. Although these individuals have a set start time, the time is necessitated by the NBA/WNBA schedule – and should not be considered evidence of *Respondent’s* “control.” (Tr. 55). These individuals are not subject to any employment policies. (Tr. 136). These individuals are not subject to discipline.¹⁰ (Tr. 50, 73).

Moreover, as noted above, the individuals generally do not interact with the Timberwolves’ employees or management. (Tr. 71-72, 76-77). Significantly, to the extent that their work is “controlled” at all, it is not by the Timberwolves, but by the Director (*i.e.* go “camera 3”), who herself is an independent contractor of the Timberwolves (and who the Petitioner has agreed is not a “supervisor” and should be included in any bargaining unit). (Tr. 71, 182-83, 224-25, 210, 212). Such a limited control by a non-employee is in stark contrast to the “virtually dictatorial authority” that the conductor in Lancaster—a symphony employee—exerted. See Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 566-567 (D.C. Cir. 2016) (noting that the conductor’s level of control was of such an extent that his role was to “mold the performance into the conductor’s personal interpretation of the score” and in so doing, he

¹⁰ The Petitioner attempted to introduce evidence at the Hearing regarding a single individual who was taken off the schedule due to his insubordinate behavior *directed towards other independent contractors*. (Tr. 73). However, such a removal does not constitute “discipline.” It simply is not the law that an individual is an employee unless the contracting entity tolerates any and all behavior and poor performance. Independent contractors certainly are required to meet certain standards in order to justify continued payment for their services and this is not a “termination” in the employment sense. If an independent contractor does not listen to the Director, for example, it simply makes sense that Respondent would not continue to use that individual in future games.

regulated essentially “all aspects” of the musicians’ performance, including their posture, volume, attentiveness, and conversation).

In contrast to the musicians’ performances in Lancaster, the individuals in the Proposed Unit use their own skill sets and judgment during the games to make decisions regarding, for example, which “fan” to capture on the “fan cam,” and what particular statistic for the font operator to put up on the center-hung board. (Tr. 33-34, 183-84). This factor supports finding independent-contractor status. Cf. Sisters’ Camelot, 363 NLRB No. 13, slip op. at 2, 2 n.5 (finding the control factor supported employee status where “[i]f canvassers are late in returning to the designated rendezvous point at the end of the shift, they may be subject to discipline. The Respondent has also disciplined canvassers on several occasions for other conduct, such as hostile behavior or unauthorized use of its property. This discipline has ranged from verbal reprimands to (in limited instances) terminations” and, notwithstanding “canvassers’ purported complete discretion over whether to report to work on any given day [w]e find such discretion outweighed by the control that the Respondent otherwise exercises over the details of the work.”).

The Petitioner relies heavily on the run-down sheet to evince control. This is insufficient to establish control in these circumstances. Notably, in DIC Animation City, Inc., 295 NLRB 989 (1989), which the Petitioner relies upon elsewhere in its argument, the Board held that a group of writers who wrote the scripts for cartoon shows were independent contractors, and not employees, despite the existence of a “developmental bible” dictating much of the plot. Id. at 989. The Board explained:

The Regional Director found that the Employer controls the manner and means of the writing process from premise to final script draft because the editors supervise and dictate the story direction, the bible and samples control creativity, and the editor and client control how the results are achieved.... Contrary to the Regional

Director, we find that the Employer does **not** substantially control the manner and means of the writing process....

The Employer does control certain aspects of the writer's work. However, the control relates primarily to the end product. The Employer specifies script length, outline length, premise length, margins, and lines per page, which relate to the 30-minute time limitations per episode. Although the Employer also edits the writer's work for content, the charges are made to ensure that the script fits within the time limitations, is consistent with the series tone, and is appropriate for the audience....

We conclude that the writers are independent contractors.... Although the Employer does provide some direction, that limited control is insufficient to warrant a finding that the writers are employees. The end product remains primarily the independent work of the writers. Therefore, we shall dismiss the petition.

Id. at 991 (emphasis added); see also Boston After Dark, 210 NLRB 38, 42-43 (1974) (finding freelance contributors to a newspaper were independent contractors, although the editors corrected and edited the work for content; noting the "crucial element" separating writers, cartoonists and photographers from regular unit employees was their ability to determine when and if they will work for the employer). As the Board has recognized, there are nuances vis-à-vis the control factor that apply in more creative industries and purported employers can and do control aspects of the work product/performance without turning the individual into a statutory "employee." Pennsylvania Academy of the Fine Arts, 343 NLRB 846, 847 (2004) (models' control over whether and when to work for the employer was strong evidence of independent contractor status); DIC Animation City, 295 NLRB at 991 (see supra); American Guild of Musical Artists, 157 NLRB 735, 741-42 (1966) (holding dancers are independent contractors).

As the Petitioner's own witness, Wiltse admitted with respect to his *own* use of independent contractors when he freelances elsewhere:

Q [Counsel for the Minnesota Timberwolves]: I mean, you, as a [video] producer, for instance, would understand, don't you, that it would be foolish to

have a production in your mind and not communicate what you envision to the people who are going to execute on it, correct?

A [Wiltse]: Correct.

(Tr. 181). Wiltse further admitted that this is precisely what the Minnesota Timberwolves organization does here. (Tr. 182). And, fundamentally, the individuals in the Proposed Unit control whether and how much to work for the Minnesota Timberwolves, which is the most relevant fact to evaluate “control” in this context.

4. Distinct Operation Factor

The Petitioner claims that “there is insufficient evidence that the employees are engaged in a distinct operation or business” (Pet. Brief at 20), because some are given t-shirts to wear at their option and the individuals do not carry work comp insurance. Petitioner also states that it should not matter that the individuals (indisputably) work elsewhere because the Timberwolves are effectively “temporarily lend[ing] an employee to another employee [sic].” (Pet. Brief at 20-22). The Petitioner’s arguments lack merit. As for the t-shirts, only some of the individuals in the Proposed Unit were given shirts, no one was *required* to wear them, and they state “Video Board” (not the name of the purported Employer). (Tr. 74, 156, 194). The lack of required insurance is not dispositive in light of all of the other evidence. And, the Petitioner’s theory that the Minnesota Timberwolves is “lending” its “employees” to other employers is misleading at best. There is absolutely no evidence that when these individuals work for other organizations that *Respondent* has anything at all to do with that arrangement.¹¹

¹¹ Quite the contrary is true. For example, when the opportunity to work a Vikings playoff game suddenly became available, a number of individuals in the Proposed Unit *who were on the Timberwolves’ schedule* simply told the Minnesota Timberwolves they were no longer available, with no consequences. (Tr. 49-50). The organization was left to find replacement contractors to staff its game. (*Id.*).

Unlike the drivers in FedEx, the individuals in the Proposed Unit do *not* “lack the infrastructure and support to operate as separate entities.” 361 NLRB No. 55, slip op. at 13. These individuals do hold themselves out as freelance media people, and several have formally registered a business entity with the Minnesota Secretary of State. (Respondent Exs. 4, 6, 7; Tr. 142, 172-73, 234). The Regional Director correctly determined that this factor supports concluding that they are independent contractors. Cf. Sisters’ Camelot, 363 NLRB No. 13, slip op. at 3 (finding this factor supported the conclusion that the canvassers were employees because they were “well integrated into the Respondent’s organization” due to “the Respondent’s significant control over the canvassers and the importance of their fundraising activities to the Respondent’s operations”).

5. Direction Factor

The Regional Director correctly determined that the Direction Factor also suggests that these individuals are independent contractors. Their work is not supervised by the Minnesota Timberwolves.¹² (Tr. 41). Most of these individuals report directly to the Control Room, where there are no Timberwolves employees, managers, or supervisors. (Tr. 70, 180, 221). There is no enforcement of rules or other tracking mechanisms. (Tr. 72-73). There is no requirement to “adhere to a strict company protocol” as in FedEx, 361 NLRB No. 55, slip op. at 13. (Tr. 136). There is no imposition of disciplinary measures. (Tr. 73, 177, 223). The Board has held that “extensive recordkeeping requirements” can be a proxy for supervision. Sisters’ Camelot, 363 NLRB No. 13, slip op. at 3. But there are no record-keeping obligations here. (Tr. 116, 216). There also are no regular meetings except for the Director role (in turn *the Director* – herself an

¹² The Petitioner’s two witnesses each parroted that Nelson was “their supervisor.” (Tr. 175-207). However, they admitted that he did not interview them, has never completed any performance reviews, and that they might not even see him except in passing when they are performing services at the Timberwolves/Lynx games. (Tr. 177, 222-25).

independent contractor – may meet with other independent contractors). (Tr. 84, 208, 214, 221, 226). Cf. Michigan Eye Bank, 265 NLRB 1377, 1379 (1982) (despite lack of daily supervision, employer effectively oversaw technicians’ work through weekly monitoring meetings).

The Petitioner argues that BKN, Inc., 333 NLRB at 145, (Pet. Brief at 19), “is analogous,” but the control of the writers’ work product in that case was far more involved than in the situation at issue here. In BKN, the writers wrote scripts for a 30-minute animated television series. Id. at 143. The Employer (through its editors and producers) was responsible “to ensure that the scripts that are being developed follow the thematic thread that is supposed to flow through all the episodes.” Id. The script-writing process involved four tedious steps, and “[a]t each of the four steps of this process the editors and the producers give suggestions and directions to the writers.... Through the revisions and suggestions made by the editors and producers, the Employer exercises extensive control over the details of the writers’ work.” Id. at 143-44. In sum: “the Employer specifies what the writers are to produce from the beginning of the script-writing process until its end, and the Employer’s production team guides the writers’ performance of their work at every step of the process, and oversees the writers’ creation of their final products.” Id. at 145. Here, the Proposed Unit is largely directed by the Director and the Engineer In Charge (other individuals in the Proposed Unit) – not the “Employer.”

In arguing that the Regional Director did not properly consider “the nature of the operation,” Petitioner relies upon Mitchell Bros. Truck Lines, 249 NLRB 476 (1980) and Michigan Eye Bank, 265 NLRB 1377 (1982), the latter of which the Respondent cited supra. (Pet. Brief at 19). Neither case supports the Petitioner’s argument. In Mitchell Brothers, a case involving truck drivers, the Board noted: “Because the drivers are constantly on the road, Mitchell Bros. cannot supervise them on the basis of personal observation.” 249 NLRB at 481.

No such impediment is present here – if the Minnesota Timberwolves wanted to physically post a Timberwolves supervisor in the Control Room at Target Center or at any location where the individuals in the Proposed Unit work – it certainly could do so. However, it simply chooses not to do so and instead relies on the Director and Engineer in Charge to ensure that the production runs smoothly. In Michigan Eye Bank, the Employer “does ... effectively oversee the technicians’ work through the weekly monitoring meetings, which it requires them to attend.” 265 NLRB at 1379 (explaining “these meetings provide the opportunity for the Eye Bank to try and understand the kinds of problems that they are having on the job And, hopefully improve performance....”). Again, there are no such “monitoring meetings” here.

6. Skills Factor

Rather than directly arguing against it, the Petitioner urges that the Skills Factor “deserves little weight,” claiming – without any citation to the record – that “the skill level of the employees *is more likely* attributable to the many years that they have been doing the same job for the Timberwolves.” (Pet. Brief at 22 (emphasis added)). Petitioner’s argument lacks merit (and any citation to the record in support of its speculative theory). Indeed, Petitioner’s argument conflicts with the testimony of its own witness. Wiltse, who operates the “fan cam,” testified:

Q [Counsel for Timberwolves]: Am I correct in my understanding that the fan cam work you’re doing is for part of the game up to you to kind of walk up and down the steps and do what you’re doing, and you’re not being given a minute by minute direction, are you?

A [Wiltse]: I personally am not.

Q Right, and it’s because you’re relied upon by the organization to get the job done correctly, right?

A It’s because of my experience.

Q Sure. And it's your unique skill set and experience that the Timberwolves rely on, isn't it?

A **It's why I believe they hired me, yes.**

Q Sure. And if you were some "Joe" off the street who could pull the trigger on a camera, you wouldn't be very useful to the organization, would you?

A Probably not.

Q And isn't that true of your colleagues as well? They have specific skills that they bring to the task?

A Some, yes.

Q Most?

A Sure.

(Tr. 183-84 (emphasis added)).

The Skills Factor supports the conclusion that these individuals are independent contractors. The positions at issue in the Proposed Unit involve technical skills. (Tr. 28, 32, 35, 36, 39, 148-49, 183-84, 201). The Respondent does not provide these individuals any training as to how to operate a camera, etc. Rather, the individuals already have these skills when they walk on to the facility. (Tr. 35-37, 39, 47-48, 114-15, 183-84, 201). Cf. FedEx, 361 NLRB No. 55, slip op. at 13 (finding the skill factor "weighs in favor of employee status" because "[d]rivers are not required to have any special training or skills; in fact, drivers receive all necessary skills via 2 weeks of training provided by FedEx"); Sisters' Camelot, 363 NLRB No. 13, slip op. at 3 ("The Respondent does not require canvassers to have any specialized education or prior experience. It hires almost everyone who applies.... Before beginning work, canvassers must undergo training.... Because canvassers need not have any special skills or prior experience and receive the minimal training necessary from the Respondent, we find ... that this factor favors employee status"). The Petitioner's exclusive reliance on Lancaster Symphony, (Pet. Brief at 22), to argue

that the Regional Director should have ignored the fact that these individuals possess significant technical knowledge and do not require on-the-job training, is unpersuasive as the analysis is sparse at best. See 357 NLRB at 1766 (“The musicians are highly skilled, but so are many other types of employees who are covered by the Act.”)

7. Employer’s Regular Business Factor

The Petitioner claims that this work is part of the Timberwolves’ regular business because “the center-hung video board show is ‘essential’ to Timberwolves and Lynx games.” (Pet. Brief at 22-24). The Petitioner’s argument that the Regional Director misapplied the Regular Business Factor lacks merit.

The Employer’s Business Factor weighs in favor of employee status if the individuals “perform functions that are not merely a ‘regular’ or even an ‘essential’ part of the Employer’s normal operations, but are the very core of its business.” FedEx, 361 NLRB No. 55, slip op. at 14. Although the services at issue here do play a role in the overall fan experience, there is absolutely no evidence that if the center-hung board went down (and there was no work for the individuals in the Proposed Unit to do that evening) that the players would simply pack up their basketballs and go home. (Tr. 113, 218). Contra Lancaster Symphony Orchestra, 357 NLRB at 1765 (the musicians “are in the business of performing music, and thus their work is part of the employer’s regular business”). The individuals in the Proposed Unit are most certainly *not* in the business of playing basketball, and therefore, their work is not part of the Timberwolves’ regular business.

Indeed, as the Petitioner’s own witness (Joann Babic) admitted that she was sure that they would still play the game if the board went down, this service cannot be pivotal to Respondent’s business. (Tr. 218). Cf. Sisters’ Camelot, 363 NLRB No. 13, slip op. at 4 (finding the canvassers’ work was essential to the Respondent’s business because “[t]he Respondent derived

revenues of \$271,705.82 in 2012. The record shows that canvassers were responsible for collecting \$244,878.17 (90 percent) of that total. Without the canvassers' work, the Respondent would be unable to obtain the operational funding to fulfill its mission. We therefore find, contrary to the judge, that canvassing is an integral and indispensable part of the Respondent's regular business and that this factor supports employee status." (Footnote omitted). The Petitioner relies upon Arizona Republic, 349 NLRB 1040 (2007), which determined that delivering newspapers was an integral part of a newspaper publisher's business. (Pet. Brief at 23). Again, this example presents a far different scenario than the tangential work at issue here.

8. Principal's Business Factor

Last, the Petitioner argues that the Principal's Business Factor "is of little consequence." (Pet. Brief at 24). However, the Regional Director correctly determined the Principal's Business Factor supported finding independent-contractor status.

This factor considers whether this work furthers Respondent's "ultimate business purpose," which, again, is professional athletics. Sisters' Camelot, 363 NLRB No. 13, slip op. at 5. Again, the individuals in the Proposed Unit are not critical to whether or not the Timberwolves or the Lynx complete an NBA or WNBA basketball game. Cf. id., slip op. at 4-5 (finding this factor supported employee status because "canvassers collect a high percentage of all the money that supports Respondent's programs" and "while the Respondent's ultimate business purpose is the collection and distribution of free food to underserved communities, it is clear that it has established and directs its own fundraising operation, which relies primarily on the financial support collected by the canvassers" (footnote omitted)).

V. CONCLUSION

Ultimately, the Petitioner suggests that because the Minnesota Timberwolves has an interest in ensuring the individuals in the Proposed Unit deliver a quality product, that they are

“employees.” But that is not the law. Contracting entities can and do hold their contractors to high standards and expect to receive a value for the services they pay for without creating an “employment” relationship. In sum, the Regional Director correctly determined that the Respondent met its burden of demonstrating that the individuals in the Proposed Unit are independent contractors and the Board should affirm his D&O.

Dated: August 2, 2016.

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STATEMENT OF SERVICE

I hereby certify that on August 2, 2016, true copies of the foregoing

RESPONDENT'S RESPONSE TO NLRB ORDER GRANTING
PETITIONER'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND ORDER

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